(3)

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

STATE OF NEBRASKA,
Plaintiff

v.

STATE OF WYOMING,
Defendant

MOTION OF PLATTE RIVER TRUST FOR LEAVE TO INTERVENE AS PLAINTIFF

MEMORANDUM IN SUPPORT OF MOTION

AND

COMPLAINT IN INTERVENTION

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TABLE OF CONTENTS

Motion for Leave to Intervene as Plaintiff

Memorandum in Support of Motion for Leave to Intervene

	Page
Statement of the Case	1
Jurisdiction	2
Reasons for Granting Intervention:	
I. The Platte River Trust meets this Court's standards for intervention in original actions	2
II. The Platte River Trust has interests at issue that are compelling and protectable	4
III. The Platte River Trust's interests will be directly affected by this action	10
IV. The Platte River Trust will not be adequately represented by the existing parties	11
V. The Platte River Trust will present substantial issues which must be resolved in this action	15
VI. The Platte River Trust offers extensive expertise to aid in resolving issues before this Court	20
VII. This proceeding is the most efficient forum in which to address the Platte River Trust's compelling interests	21
Conclusion	23

Complaint in Intervention

Affidavit of Service

TABLE OF AUTHORITIES

	Page
CASES:	
Arizona v. California, 460 U.S. 605, 103 S.Ct. 1382 (1983)	3
Atlantis Development Corp. v. United States, 379 F.2d 818 (5th Cir. 1967)	11
Donaldson v. United States, 400 U.S. 517, 91 S.Ct. 534 (1971)	9
Havens Realty Corp. v. Coleman, 455 U.S. 363, 102 S.Ct. 1114 (1982)	9
Kentucky v. Indiana, 281 U.S. 163, 50 S.Ct. 275 (1930)	3,14
In Re Applications 15145, Etc., No. 86-692 (Neb. to be argued Mar. 31, 1987)	13
Little Rock School District v. Pulaski County Special School District, 738 F.2d 82 (8th Cir. 1984), *cert. denied*, ____ U.S. ____, 106 S.Ct. 2926 (1986)	10,13
Maryland v. Louisiana, 451 U.S. 725, 101 S.Ct. 2114 (1981)	2,3,4,20
Nebraska v. Basin Electric Cooperative, 594 F.2d 870 (8th Cir. 1979)	5,6
Nebraska v. REA, 594 F.2d 870 (8th Cir. 1979)	5,6
Nebraska v. REA, Nebraska v. Ray, Nos. CV76-L-242, CV78-L-90 (D. Neb. Mar. 23, 1979)	5
Nebraska v. REA, 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. 1978)	6,22
Nebraska v. Wyoming, 345 U.S. 981, 73 S.Ct. 1041 (1953)	*passim*
Nebraska v. Wyoming, 325 U.S. 665, 66 S.Ct. 1 (1945)	*passim*
Nevada v. United States, 463 U.S. 110, 103 S.Ct. 2906 (1983)	22
New Jersey v. New York, 345 U.S. 369, 97 S.Ct. 1081 (1953)	3
Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967)	9,11
Oklahoma v. Texas, 258 U.S. 574, 42 S.Ct. 406 (1922)	3,4

	Page
Oneida Indian Nation v. New York, 732 F.2d 261 (2d Cir. 1984)	11
Riverside Irrigation District v. Stipo, 658 F.2d 762 (10th Cir. 1981), *on remand, Riverside Irrigation District v. Andrews*, 568 F. Supp. 583 (D. Colo. 1983), *aff'd*, 758 F.2d 508 (10th Cir. 1985)	22
Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983)	12,13,21
SEC v. Flight Transportation Corp., 699 F.2d 943 (8th Cir. 1983)	9
Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977)	13
Texas v. New Jersey, 379 U.S. 674, 85 S.Ct. 626 (1965)	3
Trbovich v. United Mine Workers, 404 U.S. 528, 92 S.Ct. 630 (1972)	4,12
United States v. Stringfellow, 783 F.2d 821 (9th Cir. 1986), *cert. granted*, ____ U.S. ____, 106 S.Ct. 2273 (1986)	11,12
Utah v. United States, 394 U.S. 89, 89 S.Ct. 761 (1969)	4
STATUTES:	
Electric Consumers Protection Act of 1986, Pub. L. 99-495, 100 Stat. 1243 (1986) *to be codified at* 16 U.S.C. § 797	15
Endangered Species Act, Pub. L. 93-205, 87 Stat. 884 (1973); Pub. L. 95-632, 92 Stat. 3751 (1978); Pub. L. 96-159, 93 Stat. 1225 (1979); Pub. L. 97-304, 96 Stat. 1426 (1982), *as codified at*, 16 U.S.C. §§ 1531-1543 (1982 & 1985 Supp.)	5-9,14,15
Fish and Wildlife Coordination Act, ch. 55, 48 Stat. 401 (1934); ch. 965, 60 Stat. 1080 (1946); Pub. L. 85-624, 72 Stat. 563 (1958), *as codified at*, 16 U.S.C. §§ 661-667 (1982 & 1985 Supp.)	14,15
Fish and Wildlife Conservation Act, Pub. L. 96-366, 94 Stat. 1322 (1980), *as codified at*, 16 U.S.C. §§ 2901-2911 (1982 & 1985 Supp.)	14,15

	Page
Judiciary Act, 28 U.S.C. § 1251(a) (1982 & 1985 Supp.)	2
Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918); ch. 634, 49 Stat. 1556 (1936); Pub. L. 93-300, 88 Stat. 190 (1974), *as codified at*, 16 U.S.C. §§ 703-712 (1982 & 1985 Supp.)	14
National Environmental Policy Act, Pub. L. 91-190, 83 Stat. 852 (1970), *as codified at*, 42 U.S.C. §§ 4331-4370 (1982 & 1985 Supp.)	15
Neb. Rev. Stat. § 46-2,108 (1984)	13
Nongame and Endangered Species Conservation Act, Neb. Rev. Stat. § 37-430, *et seq.* (1984)	13
U.S. CONSTITUTION:	
U.S. Const. art. I, § 2, cl.2	2
ADMINISTRATIVE REGULATIONS AND ORDERS:	
50 C.F.R. § 17.11 (1986)	5
50 C.F.R. § 17.95 (1986)	5
50 *Fed. Reg.* 50,726 (Dec. 11, 1985)	5
50 *Fed. Reg.* 21,792 (May 28, 1985)	5
49 *Fed. Reg.* 10,526 (Mar. 20, 1984)	5
44 *Fed. Reg.* 3,547 (Jan. 17, 1979)	8
43 *Fed. Reg.* 59,871 (Dec. 22, 1978)	8
43 *Fed. Reg.* 20,938 (May 15, 1978)	5
43 *Fed. Reg.* 6,233 (Feb. 14, 1978)	5
40 *Fed. Reg.* 58,308 (Dec. 16, 1975)	5
35 *Fed. Reg.* 8,495 (June 2, 1970)	5
32 *Fed. Reg.* 4,001 (Mar. 11, 1967)	5
Letter from Lynn Greenwalt, Director, Fish and Wildlife Service to Robert Feragen, Administrator, Rural Electrification Administration (Dec. 8, 1978) ("Grayrocks Biological Opinion")	6-7,18
Decision and Order of the Endangered Species Committee on Application for Grayrocks Dam and Reservoir (Feb. 7, 1979) ("Exemption Decision")	8

	Page
Letter from Assistant Director, Nebraska Game and Parks Commission, to General Manager, Little Blue Natural Resources District in re: Biological Opinion on Catherland Project (Jan. 31, 1983) ("Nebraska Biological Opinion")	13,16,18
COURT RULES:	
Supreme Court Rule 9.2	2
Federal Rule of Civil Procedure 24	2,9,10, 23
OTHER AUTHORITIES:	
Agreement of Settlement and Compromise (Dec. 4, 1978)	5-9
Convention Between the United States and Japan, Mar. 4, 1972, 25 U.S.T. 3329, T.I.A.S. No. 7990	14
Convention Between the United States and the U.S.S.R., Nov. 19, 1978, 29 U.S.T. 4647, T.I.A.S. No. 9073	14
P. Currier, G. Lingle and J. VanDerwalker, *Migratory Bird Habitat on the Platte and North Platte Rivers in Nebraska* (1985) ("*Migratory Bird Habitat*")	5,16-18
H.R. Rep. No. 95-1804, 95th Cong., 2d Sess., *reprinted in* 1978 U. S. Code Cong. & Admin. News 9453	7
Nebraska Department of Natural Resources, *Surface Water Use in Nebraska's Platte River Valley* (1980)	16
Platte River Trust Declaration	4
Pub. L. 95-632, 95th Cong., 2d Sess, 92 Stat. 3751 (1978)	8
D. Sheer, "An Analysis of Alternative Operating Procedures for Bureau of Reclamation Reservoirs on the North Platte River, Wyoming," (U.S. Bureau of Reclamation 1985)	20
Staff Report to the Endangered Species Committee, "Grayrocks Dam and Reservoir" (Jan. 19, 1979)	8
R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice*, (6th Ed. 1986)	3

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MOTION OF PLATTE RIVER TRUST FOR LEAVE TO INTERVENE AS PLAINTIFF

The Platte River Whooping Crane Critical Habitat Maintenance Trust (hereinafter "The Platte River Trust"), by its attorneys, respectfully moves the Court for leave to intervene as plaintiff in this action pursuant to Rule 9.2 of the Rules of the Court, and to file a Complaint in Intervention in the form attached to this Motion.

The Platte River Trust seeks to have this Court enforce and modify its earlier Decrees in this action to require a regulated flow of the North Platte River necessary to protect migratory bird habitat. Intervention by The Platte River Trust is appropriate because it claims a compelling interest relating to the equitable apportionment of the waters of the North Platte River by virtue of its federally-endorsed, court-sanctioned, and congressionally-recognized obligation to protect the habitat of migratory birds on the Platte River; because it is so situated that any equitable apportionment of the North Platte will directly affect its interests and may, as a practical matter, impede its

ability to protect its interest in maintaining migratory bird habitat; and because neither the party States nor the federal government will adequately protect its interests in the resolution of this action.

Respectfully submitted this 20th day of March 1987,

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MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS PLAINTIFF

STATEMENT OF THE CASE

This is an action to enforce and modify the equitable apportionment of the waters of the North Platte River among the States of Colorado, Wyoming, and Nebraska. The Court issued its first Decree in 1945, *Nebraska v. Wyoming*, 325 U.S. 665 (1945), which was later modified and supplemented upon the joint stipulation of the parties in 1953. *Nebraska v. Wyoming*, 345 U.S. 981 (1953). The Court has retained jurisdiction under those Decrees. 325 U.S. at 671-72, ¶ XIII. The Platte River Whooping Crane Critical Habitat Maintenance Trust (hereinafter "The Platte River Trust") seeks to intervene to ensure that any enforcement or modification of those Decrees recognizes the need for regulated river flows to preserve the downstream habitat of migratory birds.

JURISDICTION

The Court's original exclusive jurisdiction has been invoked by the State of Nebraska pursuant to Article III, Section 2, Clause 2, of the United States Constitution as implemented by the Judiciary Act, 28 U.S.C. § 1251(a). That jurisdiction has been retained by this Court to the present. 325 U.S. at 671 ¶ XIII.

REASONS FOR GRANTING INTERVENTION

I. THE PLATTE RIVER TRUST MEETS THIS COURT'S STANDARDS FOR INTERVENTION IN ORIGINAL ACTIONS.

This Court's standards for intervention in original actions all favor intervention by the Platte River Trust in this proceeding.

While there is no express rule governing intervention in original actions in the Supreme Court, Rule 9.2 of this Court provides in relevant part that "the Federal Rules of Civil Procedure . . . where their application is appropriate, may be taken as a guide to original actions in this Court." Rule 24 of the Federal Rules of Civil Procedure establishes the requirements for intervention in federal district courts.[1] The standards set by that rule are consistent with this Court's practice in allowing intervention in original actions.

[1] Rule 24 provides for permissive intervention, Fed. R. Civ. P. 24(b), and intervention of right, Fed. R. Civ. P. 24(a). Intervention of right shall be granted when a federal statute grants such right, Fed. R. Civ. P. 24(a)(1), or when:

> the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). Permissive intervention is appropriate if intervention will not unduly delay or prejudice the proceedings and if the intervenor's claim has a question of fact or law in common with the main action. Fed. R. Civ. P. 24(b)(2).

Intervention in this Court is appropriate if the proposed intervenor claims a direct interest in the subject matter of the original action, *Maryland v. Louisiana*, 451 U.S. 725, 745-46 n.21 (1981) (granting intervention to gas pipeline companies upon whom fell the burden of a tax being challenged), shows that its interest may not be vigorously represented by existing parties, *Arizona v. California*, 460 U.S. 605, 614 (1983) (granting intervention to numerous Indian tribes who claimed that the United States was not adequately representing their interests), or if adjudication of the dispute will, as a practical matter, adjudicate rights belonging to the intervenor, *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922) (granting intervention to property owners whose property was the subject of an interstate boundary dispute); *Texas v. New Jersey*, 379 U.S. 674, 677 (1965) (granting intervention to another State that claimed a right to escheat a portion of the property in question). *See generally*, R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* ¶ 10.10 (6th Ed. 1986).

This Court has recognized the need for both states and individuals to intervene in a variety of cases, including original actions. A private party may intervene in an original action if it can show that it has "some compelling interest in his own right, apart from his interest in a class with all citizens and creatures of the State, which interest is not properly represented by the State." *New Jersey v. New York*, 345 U.S. 369, 372-73 (1953). In *New Jersey v. New York*, the Court denied intervention to the City of Philadelphia, holding that the City had not shown that it was inadequately represented by the State of Pennsylvania, which was already a party to the action. Similarly, in *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930), the Court denied intervention to a group of taxpayers because the citizens were only challenging the propriety of their own State's actions, and did not show "any further and proper interest" in the subject of the suit. The Court in *Kentucky v. Indiana* explained, however, that intervention would have been appropriate if the citizens had shown that they possessed an interest that distinguished them from the State's taxpayers in general. *Id.*

Precisely the situation envisioned by the Court in *Kentucky v. Louisiana* arose in the recent *Maryland v. Louisiana* case. In

that original action, the Court found that intervention by seventeen pipeline companies was appropriate both because the companies had "a direct stake in this controversy" and because intervention would aid the Court in "a full exposition of the issues." *Maryland v. Louisiana*, 451 U.S. at 745-46 n.21. Citing *Oklahoma v. Texas*, 258 U.S. 574 (1922), the Court noted that "it is not unusual to permit intervention of private parties in original actions." *Id.* *See Utah v. United States*, 394 U.S. 89 (1969) (intervention is appropriate if the intervenor and the United States have conflicting claims to the same property); *see also Trbovich v. United Mine Workers*, 404 U.S. 528, 536-39 (1972) (permitting intervention by union members notwithstanding the presence of the Secretary of Labor to represent their interests because the public policy concerns of the government are not always exactly the same as the interests of individual union members).

As the succeeding portions of this Memorandum demonstrate, The Platte River Trust fully satisfies all the intervention standards established for original actions before this Court.

II. THE PLATTE RIVER TRUST HAS INTERESTS AT ISSUE THAT ARE COMPELLING AND PROTECTABLE.

The Platte River Trust is a tax-exempt trust, incorporated in Nebraska, with responsibility for monitoring, maintaining, and restoring migratory bird habitat in the Platte River valley. The Platte River Trust exists for

> carrying out . . . financing programs, activities, and acquisitions to protect and maintain the migratory bird habitat in the so-called Big Bend area of the Platte River between Overton and Chapman, Nebraska. . . . The programs, activities, and acquisitions . . . shall be formulated to protect and maintain . . . the physical, hydrological, and biological integrity of the Big Bend area so that it may continue to function as a life-support system for the whooping crane and other migratory species which utilize it.

Platte River Trust Declaration, ¶ II.

The Platte River Trust was funded in December 1978 by the Basin Electric Power Cooperative, Inc. to fulfill its obligations under the terms of a Settlement Agreement reached in litigation over construction and operation of the Grayrocks Dam and Reservoir in Wyoming. Agreement of Settlement and Compromise (Dec. 4, 1978); Order Dismissing with Prejudice, *Nebraska v. REA, Nebraska v. Basin Electric Cooperative*, 594 F.2d 870 (8th Cir. 1979); Order of Dismissal, *Nebraska v. REA, Nebraska v. Ray*, Nos. CV76-L-242, CV78-L-90 (D. Neb. Mar. 23, 1979) (collectively referred to hereinafter as the "Settlement Agreement").[2] At issue in the litigation was the applicability of the Endangered Species Act, Pub. L. 93-205, 87 Stat. 889, 16 U.S.C. §§ 1531-1543 to the Grayrocks project.[3] The Platte River Trust is administered by three trustees, one of whom is appointed by the State of Nebraska, one by the National Wildlife Federation, and one by the Missouri Basin Power Project (of which Basin Electric Power Cooperative, Inc. is the project manager).

[2] These documents appear as pages A-20 through A-36 of the Appendix to Wyoming's Brief in Opposition.

[3] Pursuant to the Endangered Species Act of 1973, as amended, 16 U.S.C. §§ 1531-1543 (and its predecessor, the Endangered Species Act of 1966, 80 Stat. 926, *repealed*, 87 Stat. 903 (1973)), the Secretary of Interior has published a list designating threatened or endangered species. 50 C.F.R. § 17.11 (1986). Included on the list of such species are the whooping crane, *designated as endangered*, 32 *Fed. Reg.* 4,001 (Mar. 11, 1967), 35 *Fed. Reg.* 8,495 (June 2, 1970); the bald eagle, *designated as endangered*, 32 *Fed. Reg.* 4,001 (Mar. 11, 1967), 43 *Fed. Reg.* 6,233 (Feb. 14, 1978); the peregrine falcon, *designated as endangered*, 49 *Fed. Reg.* 10,526 (Mar. 20, 1984); the eskimo curlew, *designated as endangered*, 32 *Fed. Reg.* 4,001 (Mar. 11, 1967), 35 *Fed. Reg.* 8,495 (June 2, 1970); the least tern, *designated as endangered*, 50 *Fed. Reg.* 21,792 (May 28, 1985); and the piping plover, *designated as threatened*, 50 *Fed. Reg.* 50,726 (Dec. 11, 1985). *See* 50 C.F.R. § 17.11 (1986) (list of endangered and threatened wildlife species). All of these species have naturally occurring habitat along the Platte or North Platte Rivers. P. Currier, G. Lingle and J. VanDerwalker, *Migratory Bird Habitat on the Platte and North Platte Rivers in Nebraska* (1985) 16-18, 22-54.

The Secretary of Interior has further determined, pursuant to 16 U.S.C. §§ 1533 and 1536, that the 53-mile-long Big Bend reach of the Platte River includes habitat which is critical to the continued survival of the endangered whooping crane. 40 *Fed. Reg.* 58,308 (Dec. 16, 1975) (proposed determination), 43 *Fed. Reg.* 20,938 (May 15, 1978) (final determination), 50 C.F.R. § 17.95 (1986).

The litigation which led to the formation of The Platte River Trust has been described briefly in Wyoming's Brief in Opposition to Motion for Leave to File Petition, in the instant case. Wyoming Brief in Opposition at 6. The State of Nebraska, among others, had filed suit in federal court in Nebraska, challenging a loan guarantee by the Rural Electrification Administration ("REA") and a dredge and fill permit granted by the U.S. Army Corps of Engineers, both for construction of the Grayrocks Dam and Reservoir on the Laramie River in Wyoming. *See Nebraska v. REA*, 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. 1978), *remanded and dismissed*, 594 F.2d 870 (8th Cir. 1979).

All the parties to that litigation participated in the Settlement Agreement. The United States' participation in the Settlement Agreement is significant because it had had serious concerns at the time over whether construction and operation of Grayrocks would violate the Endangered Species Act.[4] The parties to the Settlement Agreement, including the federal agencies, the State of Nebraska, a number of power companies, and several environmental groups, agreed that the operation of the Grayrocks project would not violate the requirements of the Endangered Species Act, *only so long* as the terms of the Settlement Agreement were satisfied. The federal government agreed to grant an exemption from the Endangered Species Act to permit the construction and operation of the Grayrocks project.

In December 1978, the Director of the U.S. Fish and Wildlife Service had found that construction and operation of the Grayrocks project "is likely to jeopardize the continued existence of the whooping crane and is likely to destroy or adversely modify the whooping crane's Critical Habitat." Letter from Lynn Greenwalt, Director, U.S. Fish and Wildlife Service to Robert Feragen, Administrator, Rural Electrification

[4] 16 U.S.C. §§ 1531-1543. Under the Endangered Species Act, a federal agency may not authorize, fund, or carry out any action if the Secretary of Interior makes a finding that the particular federal action will jeopardize an endangered species under section 1536(b)(3)(A), or if the action will have an adverse effect on critical habitat. *See id.* § 1536(a)(2).

Administration (Dec. 8, 1978) at 19 (hereinafter "Grayrocks Biological Opinion"). The Fish and Wildlife Service had concluded, however, that the existence of the whooping crane would not be jeopardized nor would its critical habitat be destroyed or adversely modified if the operator of the Grayrocks project:

> [E]stablish[ed] an irrevocable trust for the maintenance and improvement of whooping crane habitat on the Platte River. The principal contributed to this trust . . . must be adequate to generate sufficient income in any year . . . to provide for measures which offset the impact on the critical habitat of all water removed by the Grayrocks Power Project in that year. . . . This trust may be augmented by other firm and binding agreements which provide for *replacement by other means of portions of the flow removed by the Grayrocks Power Project.*

Grayrocks Biological Opinion at 18 (emphasis added).

It was not only the Department of Interior that had expressed concern about Grayrocks' effect on whooping crane habitat. Congress, while debating amendments to the Endangered Species Act in late 1978, gave particular attention to the effect of Grayrocks on crane habitat. The congressional committee considering the amendments concluded that the safeguards in the Settlement Agreement would provide sufficient protection for crane habitat:

> It is the intent of the committee that if the conflict between the parties in *Nebraska v. REA* in Federal district court in Nebraska is solved prior to the timetable established [in the Settlement Agreement], the requirements of [section 10(i)(1) of the Act, as amended] shall be deemed to have been met.

H.R. Rep. No. 95-1804, 95th Cong., 2d Sess. 24-25, *reprinted in* 1978 U.S. Cong. & Admin. News 9453, 9492-93. *See* Pub. L. 95-632, § 5, 92 Stat. 3751, 3761 (1978), *amending* Endangered Species Act of 1973, § 10(i)(1) (uncodified amendment).

Relying upon the protections afforded by the Settlement Agreement, Congress directed the cabinet-level Endangered Species Committee to grant an exemption from the Endangered Species Act to permit construction and operation of the Grayrocks project. Pub. L. 95-632, § 5, 92 Stat. 3751, 3761 (1978).

Once the Settlement Agreement was executed by the federal government, approved by the Court of Appeals, and endorsed by Congress, an exemption was granted under the Endangered Species Act, 16 U.S.C. §§ 1536(g), 1539, to permit the operation of Grayrocks. Decision and Order of the Endangered Species Committee on Application for Grayrocks Dam and Reservoir (Feb. 7, 1979) (hereinafter "Exemption Decision"). *See* 43 *Fed. Reg.* 59,871 (Dec. 22, 1978), 44 *Fed. Reg.* 3,547 (Jan. 17, 1979) (Committee consideration of exemption for Grayrocks project). The decision to grant an exemption, notwithstanding the finding of jeopardy in the Grayrocks Biological Opinion, was explicitly based upon the recommendation by the Committee staff (and the Congress) that the establishment of The Platte River Trust provided satisfactory protection for whooping crane habitat along the Platte River. Exemption Decision at 1-2; *see* Staff Report to the Endangered Species Committee, "Grayrocks Dam and Reservoir" (Jan. 19, 1979) at iv, 2.2.

Congress' review and approval, combined with the agreement by REA, the U.S. Army Corps of Engineers, and the Department of Justice to the terms of the Settlement Agreement, are clear expressions of administrative and legislative satisfaction that it provided sufficient protection for crane habitat. By the terms of the Settlement Agreement, the obligation under the Endangered Species Act, to ensure that crane habitat be adequately protected, was placed firmly in the hands of The Platte River Trust. So long as The Platte River Trust exists and effectively manages the Platte River to enhance migratory bird habitat, the terms and spirit of the Endangered Species Act will have been met.

The Settlement Agreement is unusual and affords The Platte River Trust a unique and compelling interest in the issues raised by the instant case. The Platte River Trust's obligation—to use the resources at its disposal to protect Platte River migratory bird habitat—has been imposed by the United States government, the State of Nebraska, and several private parties. Because Congress' and the Endangered Species Committee's exemption for the Grayrocks project was contingent upon the existence of The Platte River Trust, The Platte River Trust now has a special obligation to ensure that the letter and spirit of the Endangered Species Act continue to be observed. It is from this posture that The Platte River Trust moves for leave to intervene in the present proceeding.[5]

The Platte River Trust's compelling interest in protecting migratory bird habitat warrants intervention. Under Fed. R. Civ. P. 24(a)(2), for example, the interest which an intervenor must assert need not be a property right or a "specific legal or equitable interest." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967). Instead, the "interest" requirement of that Rule has been interpreted broadly as a "practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Id.* *See Donaldson v. United States*, 400 U.S. 517, 531 (1971) (interest need only be a "significantly protectable interest"); *SEC v. Flight Transportation Corp.*, 699 F.2d 943, 948 (8th Cir. 1983) (interest may be one which is contingent upon the outcome of the litigation). The Platte River Trust's interest in maintaining migratory bird habitat undoubtedly is "significantly protectable" under the *Donaldson* standard, both because its interest has been implicitly recognized as such by the federal government and the Congress, and because, as a practical matter, its interest is directly related to the issues in dispute in the present case.

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[5] The Platte River Trust seeks to protect its own organizational interests. This Court has long recognized that an organization has standing to protect its organizational interests from injury, in addition to having standing to sue on behalf of the affected interests it represents. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982).

III. THE PLATTE RIVER TRUST'S INTERESTS WILL BE DIRECTLY AFFECTED BY THIS ACTION.

The Platte River Trust's obligation to protect and enhance the habitat of migratory birds along the Platte River has been met in the past, in part, through purchase and rehabilitation of wetland and riparian lands. Its ability to preserve and restore habitat, however, will be severely compromised if the North Platte River apportionment which Nebraska is afforded is insufficient to allow for downstream flow past this newly protected and restored habitat. The flow of the North Platte is absolutely key to the existence of habitat along the Platte River because the North Platte accounts for almost 80 percent of the flow of the Platte River in the important Big Bend reach. Even more importantly, if this Court does not impose restrictions on the seasonal variation in the North Platte flow at the Wyoming-Nebraska state line, Nebraska will be unable meet The Platte River Trust's seasonal water flow needs.

As explained in some detail in section V of this Memorandum, *infra*, protection of migratory bird habitat is absolutely dependent upon the flow of water in the Platte River. Without a satisfactory pattern of river flows, the habitat which The Platte River Trust must protect will be permanently destroyed. The interest of The Platte River Trust in the outcome of the present action could hardly be stronger: any decree which affects the flows of the Platte River may fundamentally determine the success or failure of The Platte River Trust's efforts. An equitable apportionment of the North Platte River will, of course, also have a significant precedential and practical effect upon The Platte River Trust's future ability to pursue regulatory or statutory water rights within or outside the State of Nebraska.

Using the "interest" requirement of Fed. R. Civ. P. 24(a)(2) as an analogy, the effect of a case on an intervenor's rights is to be read in practical terms. *Little Rock School District v. Pulaski County Special School District*, 738 F.2d 82, 84 (8th Cir. 1984), *cert. denied*, ____ U.S. ____, 106 S.Ct. 2926 (1986). Recent cases under Rule 24 have consistently held that the *stare decisis* effect of a case is a sufficient basis for

intervention of right. *Nuesse*, 385 F.2d at 702; *Atlantis Development Corp. v. United States*, 379 F.2d 818, 828-29 (5th Cir. 1967).

The *stare decisis* effect of a court decision is a particularly appropriate basis for intervention where, as in the instant proceeding, the case is one of first impression or the decision will be afforded unusually great weight in subsequent consideration of the subject. *Nuesse*, 385 F.2d at 702; *see Oneida Indian Nation v. New York*, 732 F.2d 261, 265 (2d Cir. 1984) (court granted intervention in an Indian land dispute, holding that there was a "significant likelihood that the ultimate resolution of this litigation will lead to the conclusions of law on issues of first impression . . . which will implicate principles of *stare decisis*."); *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986), *cert. granted*, ____ U.S. ____, 106 S.Ct. 2273 (1986) (the *stare decisis* effect of a decision in a government enforcement action could "as a practical matter result in [the intervenor] being precluded from litigating several of its claims" against the same parties). There can be no doubt that any decision by this Court equitably apportioning the North Platte River will receive great deference and will affect any decision concerning the Platte River for years to come. As a very practical matter, if The Platte River Trust's interests are not presented now, they may never receive the consideration they deserve.

IV. THE PLATTE RIVER TRUST WILL NOT BE ADEQUATELY REPRESENTED BY THE EXISTING PARTIES.

Because The Platte River Trust seeks to intervene as a plaintiff and petitioner in this action, its interests cannot be represented by the State of Wyoming, to which it would be adverse. *Stringfellow*, 783 F.2d at 828. At the same time, the United States and the State of Nebraska represent only similar but not identical interests to those of The Platte River Trust and cannot represent adequately its interests.

It is evident from the United States' Memorandum that its interest in this litigation is that of the United States Bureau of

Reclamation, which constructs and operates federal dams and other reclamation projects in Wyoming and western Nebraska. Memorandum for the United States at 2-3 & n.2. In the context of Nebraska's Petition, the Bureau of Reclamation's interest is in protecting the flow of water into the Interstate Canal system and to the Inland Lakes in Nebraska to satisfy the agency's contracts to provide irrigation water. The United States is pursuing interests which differ materially from those of The Platte River Trust because the applicable federal reclamation projects depend upon removing water from the river channel—precisely the opposite of what The Platte River Trust is seeking.

In a similar situation, the Ninth Circuit drew the distinction between adverse and diverse interests. Holding that a potential intervenor was not adequately represented by the Secretary of Interior, the Ninth Circuit in *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983), permitted several national wildlife organizations to intervene as defendants in a suit challenging protection of certain federal land from development. That court explained that the adequacy of the government's representation of the intervenor's interests must be tested:

> In assessing the adequacy of the Interior Secretary's representation, we consider several factors, including whether the Secretary will undoubtedly make all of the intervenor's arguments, whether the Secretary is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected.

Id. *See Trbovich v. United Mine Workers*, 404 U.S. at 538-39 (granting intervention by union members because the Secretary of Labor's interest in protecting the public interest was "related, but not identical" to that of the individual union members); *Stringfellow*, 783 F.2d at 827 (the intervenor and the federal government were seeking "divergent remedial schemes," even though their interest in enforcement of hazardous waste disposal laws was the same). Like the intervenors in *Stringfellow*

and *Sagebrush Rebellion*, The Platte River Trust is seeking a regulated flow of the North Platte River, relief which may not be compatible with that which the United States is seeking.

There is, moreover, no basis for believing that The Platte River Trust's interests will be adequately represented by the State of Nebraska. Nebraska has not argued in the papers it has filed in this Court in favor of a regulated flow of water at the Wyoming-Nebraska state line. Neither has it argued that the need to protect migratory bird habitat militates in favor of modifying the equitable apportionment of the North Platte River. While Nebraska may be capable of making such arguments, it has indicated no willingness to do so.[6]

To have a right to intervene, The Platte River Trust need only show that representation by the State of Nebraska *may be* inadequate. *Little Rock School District*, 738 F.2d at 84; *see Stallworth v. Monsanto Co.*, 558 F.2d 257, 269 (5th Cir. 1977) (since none of the parties "have either voiced [intervenor's] concerns or expressed a desire to do so, their interests are not adequately represented"). That standard applies with equal force, notwithstanding the doctrine of *parens patriae*, where the potential intervenor may make a more vigorous presentation of the relevant issues than the government. *Little Rock School District*, 738 F.2d at 84.

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[6] Nebraska law permits the state to grant an in-stream appropriation of water for the protection of fish and wildlife. Neb. Rev. Stat. § 46-2,108 (1984). Notwithstanding this statute, Nebraska has never applied for, considered, or granted such an appropriation for the maintenance of migratory bird habitat on the Platte River. Furthermore, the State recently granted a water right to divert 125,000 acre feet of water annually from the Platte River near Overton, Nebraska, despite an opinion by the responsible state agency that the diversion would jeopardize the continued existence of the whooping crane, bald eagle and least tern. Letter from Assistant Director, Nebraska Game and Parks Commission, to General Manager, Little Blue Natural Resources District, in re: Biological Opinion on Catherland Project (Jan. 31, 1983) at 2. *See* Nongame and Endangered Species Conservation Act, Neb. Rev. Stat. § 37-430, *et seq.* (1984); *In Re Applications 15145, Etc.*, No. 86-692 (Neb. to be argued Mar. 31, 1987).

Consistent with this Court's holding in *Kentucky v. Indiana*, 281 U.S. at 173, The Platte River Trust is pursuing interests which transcend those of individual citizens of the State of Nebraska. The Platte River Trust's interest in protecting migratory bird habitat in the Platte River valley is one which the State of Nebraska cannot fully represent both because of the interstate character of the River and because of the interstate, indeed international, interest in protecting migratory bird habitat. *See, e.g.*, Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (implementing treaties with Canada, Mexico, Japan, and the USSR, providing international protection for certain migratory species, including several whose habitat includes the Platte River valley); Convention Between the United States and the U.S.S.R. (Nov. 19, 1978), 29 U.S.T. 4647, T.I.A.S. No. 9073; Convention Between the United States and Japan (Mar. 4, 1972), 25 U.S.T. 3329, T.I.A.S. No. 7990. It is, in fact, a mere happenstance of nature that Nebraska is home to one of the most attractive migratory bird roosting and nesting habitats in the Great Plains. The migratory species which use the Platte River as a nesting and roosting site also occupy habitat along the entire central flyway. Nebraska cannot represent the interest in protecting migratory bird habitat, an interest which the Congress has repeatedly recognized to be fundamentally national in character. *See, e.g.*, Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712; Endangered Species Act, 16 U.S.C. §§ 1531-1543; Fish and Wildlife Conservation Act, 16 U.S.C. §§ 2901-2911, Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667.

Finally, both the United States and the State of Nebraska may be prevented from representing The Platte River Trust's interests. Wyoming has argued in its Brief in Opposition that, by virtue of the Settlement Agreement, the State of Nebraska is estopped from litigating matters relating to allocation of waters impounded by the Grayrocks Dam and Reservoir. Wyoming Brief in Opposition at 17. If the Court accepts Wyoming's argument, neither the United States nor Nebraska (as parties to the Settlement Agreement) can represent The Platte River Trust's interests with respect to matters relating to the operation of Grayrocks. If Wyoming prevails, only The Platte River

Trust can raise issues relating to the downstream effects of the operation of Grayrocks. Even if Wyoming's argument fails, it is particularly inappropriate for either the United States or the State of Nebraska, which were adverse parties in the Grayrocks litigation, to represent The Platte River Trust's interests in ensuring that the spirit and letter of the Settlement Agreement are met.

V. THE PLATTE RIVER TRUST WILL PRESENT SUBSTANTIAL ISSUES WHICH SHOULD BE RESOLVED IN THIS ACTION.

The Platte River Trust's Complaint requests that the Court order the State of Wyoming to comply with the terms of the 1945 and 1953 Decrees and that the Court modify its earlier Decrees to ensure Nebraska's equitable apportionment of the North Platte River be made available according to a seasonal schedule of flows which recognizes downstream migratory bird habitat needs. Both prayers for relief present substantial issues deserving of this Court's attention.[7]

Since this Court's 1945 and 1953 Decrees, there has been increasing scientific study of the relationship between the flow of the North Platte and Platte Rivers and the habitat needs of migratory birds along those rivers. This increase in scientific knowledge is, alone, a sufficiently important changed condition to warrant this Court's reconsideration of the bases of its earlier Decrees.[8]

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[7] The Platte River Trust agrees with the State of Nebraska that the State of Wyoming is presently violating and threatens to violate the terms of the Court's 1945 and 1953 Decrees. It agrees further that there is strong need for the Court to order compliance with those Decrees. The arguments presented by the State of Nebraska are sound and need not be repeated here.

[8] In addition to better scientific knowledge about migratory bird habitat, congressional attention has increasingly focused on the ecological effects of water development on wildlife in general. The Court can take judicial notice that most of the federal environmental protection statutes have been enacted since the 1945 and 1953 Decrees. *See, e.g.*, Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982 & 1985 Supp.); National Environmental Policy Act, 42 U.S.C. §§ 4331-4370 (1982 & 1985 Supp.); Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667 (1982 & 1985 Supp.); Fish and Wildlife Conservation Act, 16 U.S.C. §§ 2901-2911 (1982 & 1985 Supp.); Electric Consumers Protection Act of 1986, Pub. L. 99-495, 100 Stat. 1243 (1986).

The Platte and North Platte Rivers provide one of the finest migratory bird habitats anywhere in the continent. The river valleys are the nesting and roosting-place for more than 230 species of migratory birds. *See* Grayrocks Biological Opinion; Letter to General Manager, Little Blue Natural Resources District from Assistant Director, Nebraska Game and Parks Commission, in re: Biological Opinion on Catherland Project (Jan. 31, 1983) (hereinafter "Nebraska Biological Opinion"). Six of these species are endangered or threatened, *see* note 3, *supra.*

The Platte River historically was subject to wide annual variations in flow, including an annual low flow season in the summer and an annual flooding season in the spring when the river generally filled or overflowed its banks. Both the low flow and flooding seasons were important for creating attractive bird habitat. The annual floods carried a great deal of sediment from the sandy streambed, and carved new, braided river channels. By mid-summer, as the flows declined, sediment was deposited across the river channel in a series of low-level, unvegetated sandbars. The sand-bottomed river channel was surrounded by marshlands, sloughs, and unforested wetland meadows. It is this pattern of high volume spring floods, followed by low summer flow along a wide, shallow river valley, unobstructed by trees or other tall vegetation, which has made the Platte River so attractive to migratory birds for roosting and nesting sites. All these characteristics depend for their existence upon the natural variations in flow in the river channel. P. Currier, G. Lingle and J. VanDerwalker, *Migratory Bird Habitat on the Platte and North Platte Rivers in Nebraska* 93-95, 108-14 (1985) (hereinafter "*Migratory Bird Habitat*").

This historical pattern has been radically altered by continual depletion of Platte River flows for consumptive uses and the equally alarming decreases in the river's characteristic variation in flows. The spring floods have decreased in frequency and intensity as more and more upstream reservoirs have been built to provide water storage for the spring and summer irrigation season. Nebraska Department of Natural Resources, *Surface Water Use in Nebraska's Platte River Valley* 6-7 (1980). In the

past century, there has been a sixty eight per cent reduction in average peak flows at the western end of the Big Bend reach of the Platte. Like the peak flow, the average mean flow of the Platte at the same location has declined by sixty six per cent. *Migratory Bird Habitat* at 95-98.

The decreases in water quantity and flow variation have produced a Platte River channel that is increasingly static. The river channel has become deeper and narrower since it was the seasonal flooding that carried large loads of sediment, scoured the river bottom, and changed river channel locations. The narrowed river channel has also created more mid-river vegetated islands with woody plant growth. Islands and sandbars, once kept free of woody vegetation by annual high-water scouring and frequent sediment shifts, threaten to become permanent landscape features because tall vegetation (including trees) can take root. The longer such islands remain undisturbed by flooding, the more time there is for vegetation to stabilize the soil and the less chance that a subsequent flood will redirect the river. *Migratory Bird Habitat* at 98-109. Decreased channel width and uniform water flow of the Platte River has also threatened adjacent wetlands. The decreased water flow has caused the local water table to fall; thus, the wetlands have dried up, and grasslands have been converted into croplands. *Migratory Bird Habitat* at 108-14.

The changes in the character of the river channel and the formation of mid-channel islands have been disastrous to migratory bird habitat. Significant habitat locations have been destroyed because the lower, more regular river flows are incompatible with the need for open, unobstructed, unvegetated, shallow river channels as roosting locations for whooping cranes, sandhill cranes, piping plovers, and other wading and shorebirds. *Migratory Bird Habitat* at 95-98, 119-20.

Changes in Platte River flows have altered three major migratory bird habitat types: open, unvegetated river channel and upland grasslands (needed, for example, as habitat for horned lark, lark sparrow, grasshopper sparrow, western meadowlark, sharptailed grouse, and greater prairie chicken), and lowland wetland meadows (needed, for example, as habitat for

upland sandpiper, Wilson's phalarope, sora, Virginia rail, bobolink, eastern meadowlark, dickcissel, and other waterfowl). *Migratory Bird Habitat* at 137-38. As the areas have been drained and replaced by croplands, the wetland aquatic life, which forms the protein base of many migratory bird species, has disappeared. *Migratory Bird Habitat* at 107-12, 137.

Recent studies by the U.S. Fish and Wildlife Service (including the Grayrocks Biological Opinion), the Nebraska Game and Parks Commission (including the Nebraska Biological Opinion), and The Platte River Trust, among others, have shown that the only effective way to preserve the diversity of migratory bird habitat in the Platte valley is to maintain the unique shallow, braided character of the Platte River. The only way to maintain that channel is to ensure that the flow of the River follows its natural pattern as closely as possible. Recognizing, of course, that upstream consumptive uses prevent the volume of river water (and overall width of the river channel) from ever being what it was one hundred years ago, it is apparent that a profile of flows, regulated for variation throughout the year, may go a long way toward retaining the viability of the Platte River as the premium migratory bird habitat location in the Great Plains. Research on whooping crane, sandhill crane, bald eagle, piping plover, and least tern habitat has shown that the profile of flows shown in TABLE I will optimize the ability of the Platte River to support the diversity of bird life which presently depends on the river.[9]

[9] The flows described in this brief are considered to be "jeopardy" flows. River flows below these amounts will jeopardize both the habitat of specific migratory birds and the overall biological diversity of the Platte River valley.

TABLE I
ANNUAL REGULATED FLOWS NEEDED TO AVOID JEOPARDIZING MIGRATORY BIRD HABITAT IN THE BIG BEND REACH OF THE PLATTE RIVER

Season	Calendar Dates	Instantaneous Instream Flow [10]
Autumn	Sept. 20-Nov. 10	2000-2400 cubic feet/second
Winter	Nov. 11-Feb. 26	1100-5000 cubic feet/second
Spring	Feb. 27-May 10	2000-2400 cubic feet/second
Summer	May 11-Sept. 19	800-2500 cubic feet/second
Annual	May 10-June 15	8000 cubic feet/second or more for five days duration; twice every three years

If the Platte River Trust is granted leave to intervene, it will present this Court with the scientific support for a regulated pattern of annual flows through the crucial Big Bend reach of the Platte River. It will, further, provide evidence on the downstream effects of regulation of the North Platte River, and on why the North Platte rather than the South Platte River determines downstream Platte River flows. The Platte River Trust will argue to this Court that regulation of the North Platte River can have a significant salutary effect on migratory bird habitat along the Platte River, including especially the vitally important Big Bend reach of the Platte River. Improved

[10] Flows are required year-round to sustain fish populations which provide the food base for bald eagles, least terns, and other fish-eating species of migratory birds.

Winter flows are required to maintain ice-free conditions for bald eagle feeding habitat and waterfowl roosting and feeding habitat. Autumn and spring flows are needed for crane roosting habitat and waterfowl feeding and roosting habitat. Summer flows are required for nesting and feeding habitat for least terns and piping plovers. Finally, the annual flushing or scouring flow is needed two out of every three years to scour the river channel, carry sediment, move sandbars, and prevent the formation of permanent islands and woodland growth. Because upstream dams on the North Platte River trap needed sediment loads, that river alone should not provide this needed peak flow.

regulation of upstream dams can result in greater available firm water supplies for both the State of Wyoming and the State of Nebraska. *See* D. Sheer, "An Analysis of Alternative Operating Procedures for Bureau of Reclamation Reservoirs on the North Platte River, Wyoming," (U.S. Bureau of Reclamation 1985). System-wide regulation can also provide the pattern of flows which is needed to preserve downstream migratory bird habitat.

Regulation of North Platte River flow presents a substantial issue which none of the existing parties to this action has indicated any ability or intent to present to this Court. Intervention by The Platte River Trust will allow the Court the benefit of The Platte River Trust's argument that such regulation can result in greater predictable water supply in both the State of Wyoming and the State of Nebraska, and will, generally, aid the Court in a full exposition of the issues presented by Nebraska's Petition. *See Maryland v. Louisiana*, 451 U.S. at 745-46 n. 21 (intervention appropriate if it aids the Court in a full exposition of the issues presented).

VI. THE PLATTE RIVER TRUST OFFERS EXTENSIVE EXPERTISE TO AID IN RESOLVING ISSUES BEFORE THIS COURT.

Intervention by The Platte River Trust is particularly appropriate because The Platte River Trust offers this Court the benefit of its unique expertise on management of the Platte River.

The Settlement Agreement allows The Platte River Trust to use its funds for scientific studies, for acquiring rights to water or water storage, for acquiring land or interest in land, and for managing land and water for the benefit of migratory birds. The Platte River Trust may use formal, informal, judicial, and non-judicial ways to fulfill these goals. The Platte River Trust has developed a habitat monitoring plan which gathers together all available information on the physical and biological habitat requirements of several migratory bird species. In addition, it has begun management programs to maintain or restore the dwindling supply of grasslands and

potential migratory bird roost sites. The Mormon Island Crane Meadows, a 6000-acre riparian grassland complex owned by The Platte River Trust, is being managed to encourage native grassland growth, to reduce the invasion of woodland, and to increase earthworm and snail production for crane foraging. Scientific and technical data and reports generated by The Platte River Trust have been used by the U.S. Fish and Wildlife Service, Bureau of Reclamation, and the Nebraska Game and Parks Commission. The Platte River Trust has been widely cited for its geographic data base, and its whooping and sandhill crane habitat models, and has been commonly called as an expert witness in water rights hearings. The scientific staff of The Platte River Trust has published or has in preparation numerous professional papers, including papers in the fields of animal behavior, habitat use and habitat reclamation, and is generally recognized as the premier authority on migratory bird use and habitat of the Platte River.

It is from The Platte River Trust's expertise in management of migratory bird habitat along the Platte River that comes its ability to present this Court with reliable scientific data on the Platte River flows needed to maintain habitat along the Platte and North Platte Rivers. The Platte River Trust is uniquely well qualified to present issues relating to habitat maintenance to this Court. No other party in this proceeding is able or willing to make the scientific arguments which the Court must consider in equitably apportioning the waters of the North Platte River. Intervention is particularly appropriate for this reason alone. *See Sagebrush Rebellion*, 713 F.2d at 528 (granting intervention in part because intervenor offered expertise different from that of the other parties).

VII. THIS PROCEEDING IS THE MOST EFFICIENT FORUM IN WHICH TO ADDRESS THE PLATTE RIVER TRUST'S COMPELLING INTERESTS.

By granting leave for Nebraska to file its most recent Petition, this Court has assumed original jurisdiction of the dispute among Colorado, Wyoming, and Nebraska over equitable apportionment of the waters of the North Platte River. *See* Order Granting Leave to File Petition, ____ U.S. ____

(Jan. 20, 1987). The Court has, furthermore, asserted continuing jurisdiction over any disputes among the party States over allocation of the North Platte River. *Nebraska v. Wyoming*, 325 U.S. at 671-72. So long as this Court retains jurisdiction over this interstate dispute, its jurisdiction is exclusive and The Platte River Trust may be limited in its ability to raise matters relating to interstate water allocation in other federal fora.

It is one of the purposes of this proceeding to decide once and for all how much water each State is entitled to distribute to its appropriators. *See Nevada v. United States*, 463 U.S. 110, 129-30, 143 (1983). Allocation of water in the Platte River system has been the subject of intense regional and congressional debate, and the subject of at least two multi-party suits. *See Nebraska v. REA*, 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. 1978); *Riverside Irrigation District v. Stipo*, 658 F.2d 762 (10th Cir. 1981), *on remand, Riverside Irrigation District v. Andrews*, 568 F. Supp. 583 (D. Colo. 1983), *aff'd*, 758 F.2d 508 (10th Cir. 1985).

Whenever allocation or appropriation of the Platte River system has been at issue, preservation of migratory bird habitat has been an issue of primary concern. The purpose of this proceeding will be frustrated if crucial issues remain unlitigated after the apportionment of the North Platte. As a practical matter, judicial efficiency demands that The Platte River Trust intervene to present evidence relating to downstream migratory bird habitat needs along the North Platte and Platte Rivers.

CONCLUSION

The Platte River Trust respectfully submits that its Motion for Leave to Intervene should be granted. This Court's precedents in original actions, as well as analogous cases decided under Fed. R. Civ. P. 24, strongly favor the right to intervene where, as here, the intervenor has a compelling interest at issue which is not adequately represented by the existing parties and where judicial economy would favor resolving all issues in a single action.

Respectfully submitted this 20th day of March 1987,

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Intervenor/Plaintiff
Platte River Whooping Crane
Critical Habitat Maintenance
Trust

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

STATE OF NEBRASKA,
Plaintiff

v.

STATE OF WYOMING,
Defendant

COMPLAINT IN INTERVENTION

The Platte River Whooping Crane Critical Habitat Maintenance Trust (hereinafter "The Platte River Trust") hereby complains as follows:

JURISDICTION

(1) This Court has jurisdiction over this action pursuant to section 1251 of Title 28 of the United States Code, and pursuant to Article III, Section 2, Clause 2, of the United States Constitution. This Court has retained jurisdiction over this action, following the invocation of jurisdiction by the State of Nebraska in *Nebraska v. Wyoming*, 325 U.S. 665, 671-72 ¶ XIII (1945).

PARTIES

(2) Plaintiff, the State of Nebraska, and defendants, State of Colorado and State of Wyoming, are sovereign states of the United States of America.

(3) Intervenor, The Platte River Trust, is a Nebraska not-for-profit corporation, with its principal place of business at Grand Island, Nebraska, organized as a trust fund and established in settlement of federal litigation by the State of Nebraska, the United States, and several private parties.

EARLIER PROCEEDINGS

(4) The Court's Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), equitably apportions the waters of the North Platte River among the States of Colorado, Wyoming, and Nebraska. That Decree was modified and supplemented upon the Court's approval of a stipulation among the parties in 1953. *Nebraska v. Wyoming*, 345 U.S. 981 (1953).

(5) The Court has retained jurisdiction in this action for later enforcement, supplementation, or modification of the Decrees. Paragraph XIII of the 1945 Decree, 325 U.S. at 671, provides:

> The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:
>
> * * *
>
> (c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;
>
> * * *
>
> (f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

(6) The Platte River Trust incorporates by this reference the Bill of Complaint in Equity filed in 1934 by the State of Nebraska in this action.

PRESENT PROCEEDINGS

(7) Since the Court's 1945 and 1953 Decrees in this action, a number of conditions have changed, events occurred, and new information has become available which make it appropriate and necessary for the Court to modify the Decrees. These changes include:

(a) Construction and operation of the Grayrocks Dam and Reservoir on the Laramie River in Wyoming in 1980 with its accompanying storage capacity of 104,000 acre feet of water and potential annual consumptive use of 23,250 acre feet of water;

(b) Enactment of the National Environmental Policy Act, Pub. L. 91-190, 83 Stat. 852 (1970), *as codified at*, 42 U.S.C. §§ 4331-4370 (1982 & 1985 Supp.), by which the Congress has ordered that federal actions which significantly affect the human environment be accompanied by an examination of the environmental impact of the proposed action;

(c) Enactment of amendments to the Fish and Wildlife Coordination Act, in 1946, 60 Stat. 1080, in 1958, 72 Stat. 564, and in 1965, 79 Stat. 216, *as codified at*, 16 U.S.C. §§ 661-667 (1982 & 1985 Supp.), by which the Congress has required that, before diverting or impounding waters, federal agencies consult with the U.S. Fish and Wildlife Service with a view to conservation of fish and wildlife resources;

(d) Enactment of the Fish and Wildlife Conservation Act of 1980, Pub. L. 96-366, 94 Stat. 1322, *as codified at*, 16 U.S.C. §§ 2901-2911 (1982 & 1985 Supp.), by which the Congress has encouraged each state, in coordination with federal, state, and local agencies, to develop conservation plans for fish and wildlife, with special attention to indigenous species;

(e) Enactment of the Electric Consumers Protection Act, Pub. L. 99-495, 100 Stat. 1243 (1986), by which the Congress directed that the Federal Energy Regulatory Commission "give equal consideration to . . . the protec-

tion, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat)," before granting federal licenses for power projects, *id.* § 3;

(f) Conclusion of treaties with the Soviet Union, 29 U.S.T. 4647, T.I.A.S. No. 9073 (Nov. 19, 1976), and Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990 (Mar. 4, 1972), by which the United States has pledged to protect certain migratory bird species, including the whooping crane, peregrine falcon, eskimo curlew, bald eagle, sandhill crane, and other bird species whose natural habitat includes areas within the Platte River or North Platte River valleys;

(g) Enactment of the Endangered Species Act, Pub. L. 93-205, 87 Stat. 889 (1973), *as amended by* Pub. L. 95-632, 92 Stat. 3751 (1978); Pub. L. 97-304, 96 Stat. 1426 (1982), *as codified at*, 16 U.S.C. §§ 1531-1543 (1982 & 1985 Supp.), by which the Congress pledged "to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction," 16 U.S.C. § 1531(a)(4), and declared it to be the policy of the United States that "Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species," 16 U.S.C. § 1531(c)(2);

(h) Determination, pursuant to the Endangered Species Act, 16 U.S.C. § 1533(a), that the following migratory bird species whose natural habitat exists along the North Platte River or Platte River, are threatened or endangered: the whooping crane, bald eagle, peregrine falcon, eskimo curlew, least tern, and piping plover, 50 C.F.R. § 17.11 (1986);

(i) Designation, pursuant to 16 U.S.C. § 1533(a), that the Big Bend reach of the Platte River constitutes critical habitat for the whooping crane, 50 C.F.R. § 17.95 (1986);

(j) Conclusion by the U.S. Fish and Wildlife Service in December 1978 that construction and operation of the

Grayrocks Dam and Reservoir would jeopardize the critical habitat of the whooping crane;

(k) Granting of an exemption by the federal Endangered Species Committee from the prohibitions of the Endangered Species Act, to permit the construction and operation of the Grayrocks Dam and Reservoir, subject to conditions placed on the operator of the Grayrocks project, including a requirement that The Platte River Trust be established; and

(l) Creation of The Platte River Trust by the United States and the State of Nebraska, among others, to mitigate the effects of the construction and operation of Grayrocks Dam and Reservoir on the habitat of the whooping crane and other migratory birds in the Platte River valley.

(8) The State of Wyoming is presently violating and threatens to violate the terms of the Decrees in the manner more particularly described in paragraph 3 of the "Petition for an Order Enforcing Decree and for Injunctive Relief," filed by the State of Nebraska in this action on October 6, 1986, which paragraph is incorporated herein by this reference.

THE PLATTE RIVER TRUST'S INJURY

(9) The Platte River Trust has a trust obligation to protect, enhance, promote, and maintain migratory bird habitat in the Big Bend reach of the Platte River in Nebraska so that the area continues to support a wide diversity of migratory bird habitat.

(10) The manner in which the Court resolves the issues raised in Nebraska's "Petition for an Order Enforcing Decree and for Injunctive Relief," will profoundly affect the vital habitat of the endangered whooping crane, least tern, and threatened piping plover and will profoundly affect other downstream migratory bird habitat because any equitable apportionment of waters will determine the maximum amount of water which the State of Nebraska may have available to allocate for preservation of such habitat.

(11) The manner in which the Court resolves the issues raised in Nebraska's "Petition for an Order Enforcing Decree and for Injunctive Relief," will, as a practical matter, have a strong precedential and potentially prejudicial effect upon The Platte River Trust's ability in the future to ensure that regulated flow in the Platte River is sufficient to avoid jeopardizing habitat essential for the survival of the whooping crane and other endangered or threatened species since lower courts may defer to this Court's conclusions on how best to accommodate migratory bird habitat in an equitable apportionment of water.

(12) Neither the States of Nebraska, Colorado, or Wyoming, nor the United States, can nor will adequately represent the interests of The Platte River Trust in maintenance of migratory bird habitat on the Platte River since the States and the United States are primarily concerned with consumptive uses like irrigation and power generation.

(13) The habitat vital for the survival of the whooping crane, sandhill crane, white-fronted goose, least tern, piping plover and bald eagle, and the species themselves will be jeopardized if the manner in which the Court resolves the issues raised in Nebraska's "Petition for an Order Enforcing Decree and for Injunctive Relief," does not provide for seasonal regulated flows in the Platte River from Overton, Nebraska to Grand Island, Nebraska, of at least the amounts shown in Table I.

Table I

Required Flow Regulation

Season	Calendar Dates	Instantaneous Instream Flow
Autumn	Sept. 20-Nov. 10	2000-2400 cubic feet/second
Winter	Nov. 11-Feb. 26	1100-5000 cubic feet/second
Spring	Feb. 27-May 10	2000-2400 cubic feet/second
Summer	May 11-Sept. 19	800-2500 cubic feet/second
Annual	May 10-June 15	8000 cubic feet/second or more for five days duration; twice every three years

(14) Changed conditions, manifested by recent federal statutes and better scientific knowledge about the environmental effects of water allocations, demand that this Court modify the terms of the Court's 1945 and 1953 Decrees to afford consideration to such effects in any equitable apportionment.

(15) The current and imminent actions of the State of Wyoming contravene the rationale and purpose of the Court's 1945 equitable apportionment (as modified in 1953) by appropriating water and constructing storage capacity which the Decrees did not anticipate.

WHEREFORE, The Platte River Trust prays that the Court enter an order enforcing and modifying its 1945 and 1953 Decrees to:

(1) Require the State of Wyoming to comply with the provisions of the 1945 and 1953 Decrees in this action;

(2) Require that the State of Wyoming make available to the State of Nebraska the water apportioned to that State in a manner and according to an annual schedule which recognizes the downstream river flow needs of migratory bird habitat; and

(3) Provide such other and further relief as this Court shall deem proper, necessary, and equitable in the circumstances.

Respectfully submitted this 20th day of March 1987,

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Attorneys for
Intervenor/Plaintiff
Platte River Whooping Crane
Critical Habitat Maintenance
Trust

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

STATE OF NEBRASKA,
Plaintiff

v.

STATE OF WYOMING,
Defendant

AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA
CITY OF WASHINGTON } ss

I, Peter J. Kirsch, being first duly sworn on oath, hereby certify that three true and correct copies of the foregoing (1) Motion of Platte River Trust for Leave to Intervene as Plaintiff, (2) Memorandum in Support of Motion for Leave to Intervene, and (3) Complaint in Intervention, were served on each of the parties required to be served, in accordance with Supreme Court Rule 9.3, by depositing the same in the United States mail, with first-class postage prepaid, and addressed on this 20th day of March to:

The Honorable Charles Fried
United States Solicitor General
United States Department of Justice
Tenth and Pennsylvania Avenues, N.W.
Washington, D.C. 20530

The Honorable Michael J. Sullivan
Governor of the State of Wyoming
State Capitol
Cheyenne, Wyoming 82002

The Honorable A.G. McClintock
Attorney General of the State of Wyoming
State Capitol, Room 123
Cheyenne, Wyoming 82002

The Honorable Roy Romer
Governor of the State of Colorado
State Capitol Room 136
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The Honorable Duane Woodard
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The Honorable Robert M. Spire
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Subscribed and sworn to before me, this day of March 1987:

Notary Public